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ABSTRACT

Approximately 10 to 15 years ago the Swedes became aware that the incidence of cohabitation under marriage-like conditions but without marriage had increased tremendously. This increasingly prevalent social behavior raised problems concerning the legal custody of the children of such unions and, ultimately, a way of granting unmarried parents joint custody of their children was worked out. For Americans and Norwegians joint custody became a social issue in the context of divorce. Research and public debate in this area have focused exclusively on the problem as found in the U. S. and Norway; until recently, there has been no discussion in Sweden about what joint custody is, could be, or should be. Custody from legal points of view is a fairly simple matter; the concept of "true" custody (i.e., custody in practice, or in "reality") is also fairly simple in nature. The concept of joint custody, however, presents complications that are evident in literature from Norway, Sweden, and the United States. Especially complicated is the issue of "equal rights and responsibilities" in the context of joint custody. Depending on how the concept is handled, the term can be meaningful and important or an empty formality. (RH)

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CUSTODY; AN ATTEMPT TOWARD A CONCEPTUAL CLARIFICATION

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Legal aspects

In e.g. the Californian law the one having custody of a child has "the rights and responsibilities of child rearing". In the Norwegian law the corresponding term was not defined at all. In the new Norwegian law taken in 1981, however, it is stated that the child has a right to be taken care of and a right to solicitude. It is also said that the one having custody of the child should give the child reasonable education and care. In the Swedish law it is stated that the one having custody of the child should take care of the individual and give it a reasonable upbringing. It is further stated that the custodian should make sure that the child receives subsistence and education in accordance with what is reasonable with the background of the situation of the parents and the possibilities of the child. It is also stated that the child should be supervised by the custodian.

In a proposal from the Swedish Government to the Swedish Parliament the child is made even more central. It is there stated that the child has the right to be taken care of, the right to confidence and the right to a good upbringing. Albeit the Swedish law does not talk about "rights and responsibilities" the law is interpreted in this way. The rights, however, seem to be the right to decide since the child cannot decide itself when it is a minor child. It means that the custodian decides on behalf of the child and to the best of the child. In its turn this truly means that it is not a question of rights but of responsibilities (cf. Smith, 1980, 55 ff).

In ancient times the children were more looked upon as property of their parents while the development has, somewhat exaggerated, turned reality upside down, today it seems more like the parents to be the property of their children. There still are, however, countries where the children are looked upon as being owned by their parents (cf. Adegboye, 1981) and certainly in true life many parents still look upon children as their property or as owned by them.

Under Roman law the father was the custodian of his children, they were his property which he could handle as he preferred (Robinson, 1979). In most societies of today, however, the children are under joint custody of their parents under "normal" conditions, i.e. when the parents of the child are married to each other. There still are, however, some societies where the father is the sole custodian independent of marital status of the father and the mother and their relationship, one of those societies is Nigeria (cf. Adegboye, 1981).

The child is from birth under custody of both parents jointly if they are married to each other - this statement is true for most modern societies. If the parents are not married to each other the mother in most modern

societies is the sole custodian of the child from birth. If the parents, however, marry after the birth of the child in many societies the child will be under custody of both parents jointly automatically from the time of marriage.

To our knowledge there is only one exception to the rule that unmarried mothers are automatically sole custodians of their children. In Iceland the unmarried mother is automatically custodian of the child and so is also jointly the father of the child from birth if the mother and the father are cohabiting under marriage-like conditions without being married. This law is in force from 1982. There is a special background for this rule in Iceland. Cohabitation without marriage but under marriage-like conditions is a long unbroken tradition in Iceland (cf. e.g. Björnson, 1971). If the parents cohabit they can, according to Swedish law (since 1977) if they agree, go to court and apply for joint custody. The court is not allowed to deny such a joint custody if it is not obvious that a joint custody would be directly contradictory to the best of the child. In a Governmental proposition to the Parliament it is suggested that the parents in such cases should not have to go to court but announce their wish to the population registration authority, which has no right to deny them a joint custody.

In Norway they already have such a possibility since 1982.

There is a proposal from a Governmental committee in Finland that the parents could agree upon a joint custody if they are cohabiting and have it registered at the population register.

In Denmark a governmental committee has decided not to propose a possibility for joint custody among cohabiting parents.

Some of the states in the USA has statutes permitting joint custody and using joint custody as a legal concept (Milne, 1979). Some other states do not explicitly permit joint custody but there are no rules against joint custody while in many states the law has been interpreted to permit joint custody. There are some states in the USA forbidding joint custody by statute (Elkin, 1979). What is said here about the situation in the USA is true for joint custody after divorce, while it has not been possible for us to find any information about the possibility for joint custody among unmarried cohabiting parents or among parents never having been married to each other or never having cohabited.

The situation in Norway is very similar to the one in some states of the USA. The Norwegian law until 1981 did not explicitly forbid joint custody after divorce so some courts decided as early as 15 years ago to grant a joint custody to parents at time of divorce. There were, however, few cases 15 years ago. In the Norwegian law today it is possible for parents who separate or divorce to write a contract that they shall have joint

custody, such a contract has to be delivered to the regional administrative authority. Iceland has decided to postpone a decision of joint custody after divorce and after cohabitation has ended with a separation, until the experiences from Sweden and Norway are analyzed.

In a governmental proposition to the Parliament in Sweden it is proposed that when the court grants a divorce between the parents the child should automatically be under joint custody. If one of them, however, wants a sole custody the court has to decide under whos custody the child should be.

Legal and true custody

About 10-15 years ago the Swedes became aware of the fact that cohabitation under marriage-like conditions but without marriage had increased tremendously in numbers. As Trost (1980) has shown there was an increase of cohabitation from about one per cent of all couples living together in the beginning of the 1960's to six or seven per cent in 1970 and to about 15 per cent in 1978. Today the figures in Sweden show that somewhat more than 20 per cent of those living together do so without being formally married and less than 80 per cent being married.

About 15 years ago, in the public debate, demands were raised for the possibility of parents to have a legal and not only true custody of their children when cohabiting under marriage-like conditions. It was stated that it was unjustifiable to the father of the child as well as to the child that the mother was the only one having custody of the common child when they all lived in the same household. It was claimed that the father easily was labelled as not a true father but just as a person. This in its turn was claimed to mean that the system would run the risk of him not identifying himself as a father, neither the child would identify him as the father. The labelling could also more directly have an effect upon the mental health and social climate of the child.

Some claimed in opposition to this that if the father wanted custody of the child together with the mother they could and should marry. The politicians perceived as an important answer to that type of objection the counter-objection that society should not force an individual or a group of individuals to act against their consciences out of mere formalities. It was claimed that it was simple to grant the father custody of the child when he and the mother could show to the authorities that they cohabited and both wanted to have custody of the child. The politicians meant that it ought to be possible to grant the parents joint custody of their child. At the same time they meant that the rules could not automatically have such an effect - contrary to the situation of today in Iceland.

The background for the idea of joint custody is quite dissimilar in for instance the USA and Norway than in Sweden. While in Sweden the demand for joint custody came in the public debate and concerned couples

cohabiting without being married but under marriage-like conditions, the demand in the USA and Norway came from individual couples and parents and it concerned their own situation after divorce. It is therefore reasonable that the research as well as the debate has dealt only with joint custody after divorce.

There are five principally different situations of the parents when there could be a question of sole or joint custody:

1. The parents are married to each other
2. The parents have been married to each other and are divorce
3. The parents are cohabiting with each other
4. The parents have been cohabiting with each other but have separated
5. The parents have never been married to each other or have never been cohabiting with each other.

The discussion in the USA has mainly dealt with the postmarital situation and also with the change from the state of being married to the state of being divorced. The Swedish discussion on the other hand has mainly dealt with the situation during the state of cohabitation. It is therefore reasonable that in Sweden there has until recently been no discussions about what joint custody is, could be or should be. Joint custody has been looked upon as a mere formality regulating a situation already in existance. Cohabiting couples like married couples normally have a true

Table 1:

Legal custody True custody	<u>Sole</u>		<u>Joint</u>	
	Sole	Joint	Sole	Joint
Parents are				
Married	1	2	3	4
Divorced	5	6	7	8
Cohabiting	9	10	11	12
Separated after cohabitation	13	14	15	16
Never married, never cohabited	17	18	19	20

joint custody independent of what the law might say about the formal aspects of the custody. There are in those cases no differences between the married and the cohabiting couples which also has been shown by Trost (1980). In the USA, on the other hand joint custody has been thought of as a formal arrangement as well as a true joint custody and as an alternative to both a legal and a true sole custody.

If we have understood the situation correctly there is automatically joint custody among married couples in e.g. both the USA and Sweden, while there is a possibility for a joint custody in the USA only for the postmarital situation. In Sweden on the other hand there is a possibility for joint custody independent of if the parents have been married, are cohabiting, have cohabited or have never been married or cohabiting at all. All parents have the possibility of having a joint custody, at least principally speaking.

In table 1 we try to illustrate the possibilities existing with different types of situation of the parents with sole and joint legal custody, with sole and joint true custody.

We will here give some comments upon table 1. Cell No. 4 is supposed to be the "normal" or "typical" for married couples, i.e., when they have joint legal custody as well as joint true custody. There are, however, some cases where there is a joint legal custody but the true custody is sole (cell No. 3). This can occur e.g. in cases where one of the parents is away from home for a long time, e.g. some personnel in the mercantile marine and some military personnel.

Cell No. 5 is the typical situation for divorced couples; one of the parents has the sole legal custody as well as the sole true custody. In some cases, however, there is evidently, at least in some respects a sole legal custody but a joint true custody (cell No. 6), e.g. when the visitation right (or duty) is used frequently and to a high extent.

Some have, in the debate, claimed that the joint legal custody is an impossibility because it cannot be a joint true custody. They mean that the joint legal custody will be a sole true custody (cell No. 7). On the other hand those advocating for joint custody claim that if there is a possibility for a joint legal custody it also means that there would be some kind of a pressure and also better possibilities for both parents to really take care of the child and thus have a joint true custody (cell No. 8).

In the cases when the parents are cohabiting cell No. 10 is probably the most frequent one, when the legal custody is a sole custody but the true custody is a joint custody. This is evidently the case in Sweden despite the fact that we since almost six years have a possibility of joint legal custody. Very few of those cohabiting have felt the need for a joint legal custody - the true custody is what is of importance for them and

therefore cell No. 12 is not frequently represented among the cohabiting couples.

The situation when the parents have separated after a cohabitation is very similar to the one when they have divorced - this holds true principally speaking and in countries where cohabitation is common and a social institution.

For those never having been married and never having been cohabiting with each other cell No. 17 seems to be the most easily imaginable, the truly unmarried mother. These cases have not, as far as we have found, been discussed much partly because no one has claimed any demands for a joint custody for those parents. On the one hand the number of truly unmarried mothers will probably decrease with better availability and knowledge of contraceptives and with liberal abortion laws. On the other hand the number of those cases might increase because of a sometimes assumed increase in the number of women (and men) wanting to live a truly single life but wanting to participate in the reproduction. For some of those there might be a need or a wish for a legal joint custody as well as a true joint custody (cell No. 20).

Until now we have discussed sole custody independent of whether it is the mother or the father being the sole custodian. In table 2 we illustrate the possible situations of legal and true custody somewhat more nuanced.

Cells No. 1 and 5 are the typical situations in one parent families. It should, however, be noted that in some cases where there is a one parent family the legal custodian parent does not have the true custody - the mother of the custodian is not seldom the true custodian but for simplicity we do not here deal with other true or legal custodians than the parents of the child.

Cell No. 3 can be exemplified by those cases where there is a joint legal custody after the dissolution of the marriage or the cohabitation and when the mother is the true custodian. This is supposed by some in the debate

Table 2:

		Legal custody		
		Mother	Father	Joint
True custody	Mother	1	2	3
	Father	4	5	6
	Joint	7	8	9

to be the situation in many of the cases where there is a joint legal custody and especially some time after the dissolution of the relationship or when the legal joint custody comes automatically, i.e. without any special activities carried out by the parents in order to receive a joint legal custody.

Cell No. 7 on the other hand is the "normal" case when the parents are cohabiting and have a true joint custody while the mother is the legal sole custodian.

Cell No. 9 is the typical situation for married couples and is supposed to be for those cohabiting couples having joint legal custody and also according to some in the debate of those having a joint legal custody after dissolution of marriage or cohabitation.

Definitions and paradigms

As stated above custody from legal points of view is a fairly simple matter, it is to take care of the children with the best of the children as the aim of the care-taking. Many of the legal systems claim that the custodian should take care of the child and decide on behalf of it to the extent to which the child cannot decide for itself. The older the child grows the more and more is it able to take care of itself or at least more and more actively participate in the decision-making concerning its own matters. The concept of true custody is also fairly simple in its nature, at least principally speaking. It also means to take care of the child in the same way as the laws hint at. Of course in reality it is much more complicated as we as parents and children know.

When we come to the concept of joint custody we run into more complications. The Swedish law states that if a child is under custody of both its parents they should take care of the child together. It means that they together have the right and responsibility to decide in questions concerning the child and take care of it. The Swedish law does not indicate anything more what is a joint custody.

The Norwegian law on the other hand, states, however, that if the parents have a joint custody of the child but the child steadily lives with only one of the parents, that the other one cannot oppose against that the one with which the child lives, takes stands in the direct daily care of the child. The law even specifies as an example that in such cases the one with which the child steadily lives has the right to decide if the child should be in for instance child-care. It also states that the custodial parent with which the child does not steadily live, cannot oppose against the other one moving to another part of the country.

The Swedish law presumes that if the parents have a joint custody they can collaborate and thus there is no reason for specifications in the law. If

they cannot agree or if they cannot compromise there is no basis for a joint custody and thus one of the parents can and maybe also should go to court and apply for a sole custody. The Norwegian law on the other hand gives some hints how to solve some problems. One might say that the Norwegian law is somewhat more realistic than the Swedish law. On the other hand one might also claim that the Norwegian law, contrary to the Swedish one, almost explicitly defines joint custody as a mere formality or more or less empty concept as regards true joint custody.

In a Swedish debate book, Berggren and Wikander (1977) claim that legal joint custody means the responsibility for the upbringing of a child and that true joint custody is a situation where the child lives some periods with its mother and some periods with its father - thus they equalize an alternate living with true joint custody, and claim that legal custody means nothing but shared responsibility. Thus they look upon and advocate for an interpretation of joint custody as a subpart of what it, according to the law, might include, i.e., a true alternate custody.

Roman and Haddad (1978) define joint custody as a postdivorce custodial arrangement. Thus they exclude married, cohabiting, postcohabiting, and never married or cohabiting parents. They furthermore define joint custody as an arrangement "in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children". Thus according to their opinion the concept should, when talking about the major decisions concerning the children, mean an equal share between the parents. They go on stating that joint custody is an arrangement "in which childcare is split equally or, at the most discrepant, childcare resolves itself into a two-to-one split". Thus preferably the day-to-day matters in childcare should be divided equally between the parents or at least in a way so that each parent takes care of at least one third of the childcare. Roman and Haddad mean that this should be the legal definition of joint custody.

Related to the Swedish legal definition and the Swedish law what Roman and Haddad suggest, seems to be a long step toward a "blanket legislation". Also from the Norwegian point of view this seems to be a long step in the same direction. The authors themselves, however, do not look upon their proposed definition in that way since they say that "there are now a number of successful joint custody models and, therefore, blanket legislation about living arrangements would be a mistake". The definition of Roman and Haddad evidently excludes the type of true joint custody when the child lives steadily with one of the parents and their point of view requires an alternative living arrangement for the child. A Swedish study shows that more than three quarters of the joint custody arrangements are arrangements where the child steadily lives with one parent and only about 20 per cent are cases where the joint custody arrangement means an alternate living arrangement (Andersson and Sundström, 1982).

Morgenbesser and Nehls (1981), like Roman and Haddad, talk about joint custody only as a possibility after divorce. They define joint custody as when the parents "share the rights and responsibilities for raising their child or children". They go on specifying that as a legal concept joint custody means "an equal say in decision-making and in overall child rearing". They also claim that in many cases "joint custody agreements stipulates that the child will alternatively live with each parent". It seems, however, to us hard to realize that the parent should or could be able to have an "equal say" independent of whether there is an alternate arrangement or the child stays with only one of the parents.

It is somewhat confusing when they go on discussing the concept of joint custody and the definition of the term. They claim that equal rights and responsibilities attempts to guarantee that both parents have "significant influence upon their child's growth and development". Since equal is equal and is unique it means that there cannot be any degrees of "equal rights and responsibilities". Therefore it seems somewhat confusing when they interpret their idea of "equal rights and responsibilities" as when both parents have "significant influence".

If the law states that the parents should have "equal rights" one of them can, if they agree, abstain from using his or her rights to full extent and thus end up in a lack of equal rights. This might mean that one of the parents take all the rights or that they have some kind of split different from the idea of equal rights. If, however, the legal definition also states that there should be "equal responsibilities" it is somewhat more complex. Then a parent cannot abstain from the legal responsibilities so they have to remain as equal. One is allowed to abstain from rights but not from responsibilities.

Morgenbesser and Nehls (1981) differentiates between two ways in which parents can handle a joint custody arrangement. One of the possibilities is what Morgenbesser and Nehls calls "pure joint custody". It is a situation when the parents "agree to make all major decisions about their children together". Here the term together is the important one. Another way of "handling the equal rights and responsibilities" is by specifying areas in advance in which one parent will be responsible and which areas the other parent will be responsible for.

In the first case, when the parents decide together, it is evident that they cannot have "equal rights and responsibilities". One of the parents will dominate over the other one at least in some respects. Even in the case when they specify areas of decision-making, it means that there cannot be "equal rights and responsibilities" since some of the areas are of more importance and gives a higher responsibility or give more rights than others do.

Morgenbesser and Nehls (1981, 37) say that "the crucial difference between sole custody and joint custody is the concept of equal rights and responsibilities, not the physical whereabouts of the child". Again if the "physical whereabouts" is mainly with one of the parents, how could there be any equal rights and responsibilities?

Looking at the concept as we do it means that the idea of "equal rights and responsibilities" makes joint custody defined that way to a mere formality or to an empty concept.

It seems that the idea behind the use of the term "equal rights and responsibilities" should not be interpreted literally but figuratively and should be interpreted as an attempt or a push to give both custodians the feeling that they both have rights and responsibilities and that they are supposed to collaborate.

Conclusions

are to be made after the feed-back at the work-shop.

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